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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5434

SIDNEY HINTON,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENT PEOPLE OF THE STATE OF NEW YORK

Preliminary Statement

Procedurely it is important to note that this conviction under Indictment No. 80/1969 was derived from two Richmond County, New York indictments, No. 80/1969 and

No. S 48/1969. The Appellant was tried and found guilty by a jury of the sale and possession of heroin on two separate dates under No. 80/1969. At the time of sentencing, the Appellant sought and obtained consolidation of No. S 48/1969 and No. 80/1969, having previously entered a plea of guilty to a count of criminal sale of a dangerous drug under former No. S 48/1969. Apart from the sentence imposed for the sale and possession as a result of his jury conviction, the Appellant was sentenced to a concurrent term of seven years for the criminal sale plea derived from the former No. S 48/1969. Hence, the procedural objections which the Appellant raises would apply to the first four counts of the consolidated indictment and not to the fifth count, it being derived from No. S 48/1969 and obtained by plea and not by trial.

However, a perusal of the plea minutes of No. S 48/1969 taken on May 26, 1969, shows that the Appellant entered a plea of guilty to criminally selling a dangerous drug in the third degree as necessarily contained in the first count of that indictment. In addition to promising the defendant that his sentence would run concurrently with the sentence imposed in No. 80/1969, the Court promised that he would allow the defendant "to withdraw the plea in this case and vacate any judgment I might enter in this case, in the event you take an appeal from the other judgment and it is reversed" (p. 8). The propriety of such a promise may be questioned but the record makes it abundantly clear that it was made.

Statement of Facts

The Appellant was indicted on April 22, 1969 under No. 80/1969 for two counts of sale and possession of heroin occurring on March 5th and March 17, 1969. He

was arraigned and plead not guilty on April 25, 1969. He reserved all rights with respect to motions and at his request the case was set down for all purposes for June 2, 1969. Another earlier indictment (S 48/1969) was pending and had been adjourned to May 26, 1969.

On May 7, 1969, at about 5 P.M. Assistant District Attorney Anthony I. Giacobbe called the defense attorney at his office and told him he was moving No. 80/1969 for trial. When he appeared in Court on Thursday, May 8, 1969, the defense attorney, Jerome V. Giovinazzo, contended that he was not ready and could not get ready. The Assistant District Attorney stated that the defense attorney had had some previous information that the prosecution was considering trying No. 80/1969 before No. S 48/1969 (p. 2) and that in any event No. S 48/1969 could not be made ready for trial. The Court directed counsel to pick one juror and to let the case go over from that date, Thursday, May 8th to Monday, May 12th at 2 P.M. The Court also directed the prosecutor to supply any particulars demanded by the defense. The Court also gave the defense great latitude in making any motion and allowed him to make it orally if desired. Further, the Court stated that if it became necessary to delay ruling on any motion he would adjourn the jury selection until the motion was disposed of (p. 20).

On Monday, May 12th the defense moved to consolidate No. 80/1969 with S 48/1969. It was denied. No other motion was made and the jury selection began. It continued on May 13th and 14th. On that day, Wednesday, May 14, 1969, the case was adjourned until Monday, May 19, 1969. On May 19, 1969, the defense orally moved to suppress certain property taken from him when he was arrested on March 31, 1969. The Court denied this motion. The People then opened and the defense waived

opening stating, however, that "The Defense is ready for trial, Judge".

Detective Dennis Roberts was the People's first witness. He was the undercover agent who posed as an addict and who made the purchases from Hinton. The prosecutor made a lengthy statement to the Court requesting that the public be excluded while he testified (p. 50). He stated that the officer was "still active in this community', that he still "has many cases pending in this community", that other defendants with narcotics cases were present in the courtroom and that the officer's safety and life were in jeopardy if his identity were disclosed. No factual dispute was made concerning this allegation and the defense contended itself with making "a formal objection" (p. 51). The public was excluded and Roberts testified.

He went to the Appellant's home at about 8:30 or 8:35 P.M. on March 5, 1969, and purchased two bags of heroin from him for $12. He left and delivered the bags to the police laboratory for analysis. On March 17, 1969, at about 7:30 P.M. he again went to Hinton's home and purchased two bags of heroin from him for $12 which he similarly sent to the laboratory. A chemist verified that the bags contained heroin and Detectives Labriola and Alberti confirmed the presence of Detective Roberts at the home of Sidney Hinton at the time of the sales.

The defense of alibi as to the first sale was provided by Charles Agro and Ben Hooks. Agro said that on March 5, 1969, he was working on a job when at about 7 P.M. he received a call from his wife to come home. Hooks and Hinton were at his home looking at a Cadillac he owned. He arrived home about 7:20 P.M. and met the two and discussed the price of the car, agreed on a price and was

paid $2200 cash by Hinton. His wife made out a bill of sale which he signed. He drove the car to Hinton's house, a distance of seven miles, leaving about 9:25 P.M. from his house. He then took his plates off the car. On cross examination he admitted that his copy of the bill of sale bore no date (p. 345). He based his recollection of the date upon the fact that he bought another car two days later and knew that subsequent date to be March 7, 1969. He also stated that at the time of the transaction, there was no reason for him to remember particular times (p. 353).

Ben Hooks testified he knew the appellant for twelve or thirteen years; that he brought Hinton together with Agro on March 5, 1971, because he knew Agro wanted to sell his car. He stated that they were all together from about 7:25 to about 9:30 when they drove to Hinton's house and Agro removed his plates.

The defense moved for a continuance to produce Motor Vehicle Bureau records. The defense alleged that the transfer sub on the sale from Agro to Hinton would disclose the date of sale as March 5, 1969 (p. 375). The Court sought to facilitate the production of the records but when they were not produced denied the motion and the trial was ended. The Court held that the records would merely be cumulative to the testimony of Agro and Hooks.

The conviction was affirmed in the Appellate Division, Second Department, State of New York in 37 AD 2d 693 and most recently in the Court of Appeals reported at 31 NY 2d 71.

POINT I

There was no error in advancing Indictment No. 80/1969 for trial.

With all of the argument about forcing the Appellant on for trial without adequate preparation, some salient factors have never been discussed. The defense attorney had prior knowledge that the later indictment might be tried first (p. 2). Additionally when he was notified on May 7, 1969, to be ready to go to trial on May 8th, he had already been arraigned and plead not guilty. Further he did not go to trial on May 8th. He merely picked one juror which is at most a holding device to keep the case on tap. He then had the rest of Thursday, May 8th and Friday, May 9th since the case went over to Monday, May 12th at 2 P.M. Certainly the weekend could have been utilized for preparation. On Monday the jury selection began and continued until May 14th. It was again adjourned until May 19, 1969. Hence, although the defense contends that he was unable to be ready, in fact he had the period from May 7th, 1969 to May 19, 1969 for preparation. The Court permitted him to make his motions orally if he chose. He did in fact make a number of oral motions including a motion to suppress and one to consolidate. The factual situation or the law of the case can hardly be considered involved. The defense attorney was familiar with the law of narcotic sales for he asserted he was ready to try S 48/1969 (p. 4). With twelve days an attorney can be ready to try a case such as this. *People* v. *Snyder*, 297 N. Y. 81 and *People* v. *McLaughlin*, 291 N. Y. 480 are unquestionably the law of this jurisdiction but both cases are readily distinguishable from the facts here. In *People* v. *McLaughlin, supra*, an attorney was assigned to a defendant who did not ask for

assigned counsel. The assignment was made at 12:30 P.M. and the trial commenced at two o'clock. Twenty-four hours later McLaughlin was convicted of robbery in the first degree. In the *Snyder* case counsel was assigned in a capital case and commenced trial within six days of his assignment and four days after contacting retiring counsel. Two and one-half of the six days were holidays. The defendant was an illiterate of borderline mentality. How obviously different these cases are from the one in hand where the Appellant was represented by the same retained counsel from the beginning.

The Court was acting within the area of sound discretion when it denied the defense motion for a continuance to produce the Motor Vehicle Bureau records showing the transfer of the Cadillac from Agro to Hinton. Certainly, it is a matter of common knowledge of which the Court could take judicial notice that the transfer stub would show no time. Since the time was the critical factor, can it be said that the trial judge was in error when he refused to permit a delay in the trial to obtain a document which would not disclose the time? No issue was ever made in the case that Agro had not sold his car to Hinton. The sole issue was whether it was sold at the very time the People contended he sold drugs to Detective Roberts on March 5, 1969. Had the document been produced, it could at most show that Agro transferred the car on March 5, 1969. Since both Agro and Hooks said it happened on March 5, it would be as the trial Court asserted, merely cumulative. To move a trial along, a judge must be given the power to establish limits of questioning and, absent a showing of abuse of discretion, the use of such power does not deny a fair trial to a defendant. Crim. Pro. Law Section 470.05.

POINT II

The exclusion of the public from the courtroom during the testimony of the undercover detective was proper.

Certainly the role of an undercover narcotics agent is a hard and dangerous one. The sale of drugs draws severe sentences and those engaged in the trade are ruthless and vicious. The prosecutor gave the Court good and sufficient reasons for excluding the public. The officer was still operating as an undercover agent on Staten Island (p. 50) at the time he testified. Apart from the fact that other investigations could be nullified by his disclosure, the life of the officer could be at stake. He was entering alone places where drugs were being sold. To ask him to do this after his identity was disclosed is beyond the limits an officer should be required to go. To abandon investigations already started is unfair to our community.

The defense did not dispute the truthfulness of the statements made by the Assistant District Attorney in support of his motion to exclude the public. A hearing could have been held to see if these statements were true. Instead, the defense entered a pro forma objection to the exclusion (p. 50). It offered no contrary or compromise suggestion.

Clearly, the Court has the right to exclude the public in certain cases.

In *People* v. *Hagen*, 24 NY 2d 395 at 397 (cert. den. 396 U.S. 886), the Court held that "In the balancing of policy and of interest if, for a good reason related directly to the management of the trial, the Judge closes the courtroom as to the testimony of a witness and otherwise keeps it

open to the press and public, a defendant is not necessarily deprived of a 'public' trial." If there was error in such exclusion, it was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18. In *People* v. *Nicholas*, 35 AD 2d 18 at 19 the Court wrote:

> "While it is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunual (*Matter of Oliver*, 333 U. S. 257, 278) and while in New York a speedy and public trial in all criminal prosecutions is guaranteed by statute (Civil Rights law, § 12; Code Crim. Pro., § 8), subject to certain exceptions not relevant here (Judiciary Law, § 4), the public trial concept has never been viewed as imposing a rigid, inflexible straitjacket on the courts but, rather, it has been held to be subject to the inherent power of the court to preserve order in the courtroom, to protect the rights of parties and witnesses and generally, to further the administration of justice (*People* v. *Jelke*, 308 N. Y. 56, 63)."

CONCLUSION

This Court should deny certiorari.

Respectfully submitted,

JOHN M. BRAISTED, JR.
District Attorney, Richmond County
Attorney for Respondent People of the State of New York
County Court House
Staten Island, N. Y. 10301
(212) GI 7-0049

NORMAN C. MORSE,
Assistant District Attorney
Of Counsel